No. 80-431

IN THE

Supreme Court of the United States

October Term, 1980

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CLOVIS MCALPIN and
CAPITAL GROWTH REAL ESTATE FUND, INC.,

Petitioners,

against

MICHAEL F. ARMSTRONG, as Receiver of CAPITAL GROWTH COMPANY, S.A. (Costa Rica) and CAPITAL GROWTH COMPANY, S.A. (Panama), ROBERT MOORE, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH FUND and FRANCESCO GALOFARO, suing on his own behalf and derivatively on behalf of CAPITAL GROWTH REAL ESTATE FUND, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Should this Court grant certiorari in this case to review the appealability of orders denying motions to disqualify attorneys where the Court has already agreed to review this precise issue in another case, *Firestone Tire & Rubber Co.* v. *Risjord,* No. 79-1420, and where the Court's determination of the issue, either in this case or in *Firestone,* can have no effect upon the parties here as the matter of disqualification in this case has already been fully heard on appeal and determined?

2. Should this Court grant certiorari to review detailed fact findings and legal conclusions of the Second Circuit Court of Appeals holding that a law firm should not be disqualified because of its employment of a former government attorney who had had supervisory responsibility for a related case, under the following circumstances:

a) the former government attorney was "screened" from any participation in the matter pursuant to court order, agency approval, and an ABA ethics opinion approving such a procedure;

b) both the District Court and the Court of Appeals found there was no impropriety, nor any risk of taint to the judicial process;

c) the decision below is consistent with all case authority on this issue and there is no conflict among the circuits;

d) petitioners do not claim any constitutional or statutory right is implicated, and congressional expressions on this subject, as well as the consensus of critical and professional commentary, are in accord?

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BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted by the respondents Michael F. Armstrong, as Receiver of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama), Robert Moore and Francesco Galofaro, in opposition to the petition for a writ of certiorari filed by petitioners Clovis McAlpin and Capital Growth Real Estate Fund, Inc.

Statement of the Case

The findings of fact in this case, set forth in great detail in the opinions of both the District Court (A. 66-68)[1] and the Second Circuit Court of Appeals, sitting *en banc* (A. 4-9), are substantially at variance with those set forth in the petition. Since the holdings in this case are principally premised upon these fact findings, and since it is the findings of fact which largely draw petitioners' fire,[2] they are reviewed here.

Facts

On September 3, 1974, the Securities and Exchange Commission culminated a nine-month investigation by instituting an action in the United States District Court for the Southern District of New York entitled *SEC* v. *Capital Growth Company, S.A. (Costa Rica) et al.*, 74 Civ. 3779 (CES) (the "SEC case") (181a). The complaint charged that petitioner Clovis McAlpin, aided by a number of other parties, looted millions of dollars from a group of related

1. References to pages of the appendices to the petition are designated "A. ——". References to the Joint Appendix in the Second Circuit, submitted with the petition, are designated "——a."

2. For example, compare the findings of the District Court regarding the total screening and isolation by respondents' attorneys of Theodore Altman, whose former position with the SEC in Washington provoked the dismissal motion (A. 68, A. 72, adopted by the Second Circuit, A. 22-23), with petitioners' claim to the contrary (Petition, at 7). Similarly, compare the findings regarding Altman's general supervisory role of the SEC investigation and his merely formal relationship with the litigation conducted by the New York Regional Office of the SEC (A. 66-67, A. 7-8), with petitioners' inflated claims of Altman's involvement with the matter at the SEC (Petition, at 5-6). Finally, compare the petitioners' claim that they have been denied SEC investigatory documents (Petition, at 7), with the District Court's finding that the documents are available in discovery (A. 73; *see also* 165-67a).

investment companies (referred to herein collectively as "Capital Growth"), of which McAlpin was President and Chairman of the Board. McAlpin, who had fled to Costa Rica, and certain other defendants, failed to appear in the action and a default judgment was entered against them (*see* A. 4-5).

In the complaint, the SEC requested the District Court to appoint a receiver to protect the interests of the Capital Growth shareholders and, on September 24, 1974, respondent Michael F. Armstrong was appointed Receiver of the Capital Growth companies (88a). The court charged Armstrong, as Receiver, with the responsibility of attempting to recover all monies and property which were due the Capital Growth shareholders as a result of the misappropriations engineered by McAlpin (90a). In order to recover these monies and property, Armstrong was authorized by the court to conduct investigations and institute litigation in the United States and abroad (90-91a).

Armstrong moved to have the New York law firm of Barrett Smith Schapiro & Simon, of which he was a partner, appointed as his counsel and, on October 23, 1974, the District Court entered an order approving the appointment of the Barrett Smith firm (131a).

Soon after the appointment of the Receiver, the SEC, pursuant to its regular practice, made its investigatory files available to him (131-32a).[3] The Barrett Smith firm

3. Contrary to McAlpin's accusation of "favoritism" (Petition, at 4, 7, 17 & n.17), the SEC made its files available to the Receiver, *not* to the Receiver's present litigation counsel, Gordon Hurwitz Butowsky Baker Weitzen & Shalov, and did so two years before the Gordon firm was retained. The fact is that no matter who the Receiver or his counsel was, the SEC's practice is to make such files available (A. 5-6).

thoroughly reviewed the SEC files, researched the applicable law, conducted its own factual investigation, and began to develop a plan of litigation which included lawsuits against a number of the great many individuals and business entities involved with McAlpin's tangled affairs. These efforts, together with the task of reducing to possession various Capital Growth properties in the continental United States and Puerto Rico, substantially consumed the time and effort of the Receiver and his counsel for about a year-and-a-half, continuing into early 1976.

As the investigation conducted by the Receiver and the Barrett Smith firm progressed into 1976, a potential problem of appearances arose, involving a potential defendant that was a financial institution which had been a client of the Barrett Smith firm. The Receiver decided that Barrett Smith should avoid taking an active role in the actual handling of litigation which might involve this particular potential defendant. Consequently, despite the substantial investment in time already made by the Barrett Smith firm,[4] the Receiver found it necessary to find substitute litigation counsel (133a).

Since McAlpin had absconded to Costa Rica with most of Capital Growth's remaining assets, the funds available to the Receiver were extremely limited.[5] Consequently, it was necessary to find a firm that was not only equipped to handle difficult litigation in Costa Rica as well as in the

4. Prior to the substitution of counsel, Barrett Smith had devoted approximately 2,600 hours to the receivership, consisting of services on the part of five partners, eight associates and three paraprofessionals.

5. Cash on hand at that time was approximately $200,000 (140a).

United States, but was willing to make a commitment to pursue the case to conclusion, even if little or no funds were available to pay interim compensation (135a). It was also necessary to obtain counsel with sufficient manpower to deal with the flood of paper which was sure to be generated by a large litigation with a number of major institutional defendants (A. 6-7).

Attempting to find a firm which would consider the case economically feasible, the Receiver sought one that was already involved in similar litigation in Costa Rica, such as a firm involved in litigation concerning the activities of Robert L. Vesco, who had also fled to Costa Rica. The Receiver discussed the case with several such firms, and was turned down by two firms, before contacting the Gordon firm (133a).

In March 1976, the Receiver first approached the Gordon firm, which in the Receiver's judgment was highly qualified to handle the case. David M. Butowsky, a partner in the Gordon firm, was Special Counsel to International Controls Corporation and, in that capacity, was conducting various legal actvities in Costa Rica relating to alleged Vesco defalcations (134a). Another partner had served in the United States Attorney's office for the Southern District of New York, where he had been in charge of a number of complex fraud cases. Due to the Gordon firm's ongoing activities in Costa Rica, the Receiver believed it might realize significant economies for the receivership's limited funds (133a).

During one of the early meetings following his initial approach to the Gordon firm, the Receiver learned for the

first time that Theodore Altman, who had served as an attorney with the SEC in its Washington, D.C. headquarters from 1967 to 1975, had recently become an associate at the Gordon firm (120-21a, 151a). Altman's position in 1974 was Assistant Director of the Division of Enforcement. As such, he was one of the highest ranking enforcement officers at the SEC, with about twenty-five staff members working under him in Washington.

Altman's role in the Capital Growth case was a supervisory one. This was only one of a significant number of similar cases throughout the country for which he had such responsibility. While he was generally aware of the facts in the case, he was not personally involved on a daily basis (150-51a).[6]

Most of the SEC's work on the Capital Growth investigation was handled by the staff of the New York Regional Office. The SEC complaint was prepared and filed by the New York office; signed by the New York Regional Administrator, the Associate Regional Administrator and a New York staff attorney, and litigated out of the New York office (198a).[7]

6. For example, the record reflects that two of the three letters to McAlpin from the SEC concerning Capital Growth were written by one of Altman's subordinates, Alan Rosenberg (98a, 103a). The one letter which Altman did write to McAlpin, on August 6, 1974, was an innocuous response to a letter from McAlpin, addressed to Rosenberg. In it, Altman stated that he was writing to McAlpin because Rosenberg had "left the Commission for private employment", and explained that he was only "generally aware of [McAlpin's] prior conversations and correspondence with Mr. Rosenberg . . . ." In the letter, Altman responds to McAlpin's request for information by suggesting that McAlpin consult his own attorney (105a).

7. Altman's name, like that of Stanley Sporkin, Director of the SEC's Enforcement Division, appeared on the complaint, but neither man signed it, nor was Altman, as McAlpin contends (Petition, at 6), "attorney of record."

In the course of their investigation, the Receiver and the Barrett Smith firm dealt almost exclusively with New York personnel of the SEC and, insofar as there was contact with the Washington office, it was with a supervisory attorney heading a unit separate from Altman's.

In October 1975, at a time when the Receiver and the Barrett Smith firm were in the midst of analyzing the SEC files, conducting their investigation and evaluating litigation possibilities, Altman resigned his position at the SEC to become an associate at the Gordon firm (151a). At the time, the Receiver had no reason to be aware of Altman's departure from the SEC, much less his new affiliation with the Gordon firm. Moreover, neither the Receiver, his counsel, Altman nor the Gordon firm could at that time have foreseen the course of events leading to the Receiver's retention of new counsel.

With the knowledge of Altman's prior SEC affiliation, both the Gordon firm and Barrett Smith undertook to determine the significance, if any, of the fact that Altman had had a supervisory role in the SEC's Capital Growth case. After researching the question thoroughly, both firms decided that Altman himself could not participate in the representation. However, both firms also concluded that Altman's SEC supervisory role did not require the firm's disqualification if certain procedures mandated by a formal opinion of the American Bar Association were followed.

The ABA had previously ruled that an individual lawyer's prior involvement in a matter while with the Government did not disqualify his law firm from employment in the same or a related matter if that lawyer were

screened from knowledge of, or participation in, the case. ABA Comm. on Professional Ethics, Formal Opinion No. 342, 62 *ABA Journal* 517 (1975) ("ABA Opinion 342"). *See also* Comm. on Professional and Judicial Ethics, Association of the Bar of the City of New York, Opinion No. 889, 31 *The Record* 552 (1976).

In early 1976, after several meetings between the Receiver and members of the Gordon firm, the firm accepted the representation, agreeing to "conduct all Capital Growth litigation through to conclusion" even if the Receiver lacked sufficient funds for compensation as the litigation progressed (135a). The Receiver and the Gordon firm further agreed that, in accordance with ABA Opinion 342, Altman would have no participation in the Capital Growth matter, that he would be screened and isolated from any knowledge of the case, and that he would not participate in any of the firm's earnings from the case (151a). Finally, it was agreed that the matter should be brought to the attention of the District Court for approval (121a).

On April 30, 1976, the Receiver submitted an affidavit to the District Court requesting that the Gordon firm be appointed to replace Barrett Smith as litigation counsel. In his affidavit, the Receiver disclosed Altman's previous involvement with the Capital Growth matter and informed the court that Altman would be screened from the case (134a). The District Court approved the Receiver's request to retain the Gordon firm (127-29a).

On May 10, 1976, pursuant to the procedure suggested by ABA Opinion 342, Butowsky wrote to Paul Gonson,

Associate General Counsel of the SEC, to determine whether the SEC had any objection to the Gordon firm's participation in the Capital Growth matter in light of Altman's prior employment (143a). The matter was referred to Marvin E. Jacob, Associate Regional Administrator for the New York Region of the SEC, who, in a letter dated July 8, 1976, stated that the SEC did not see any ground for disqualification of the Gordon firm and had no objection to retention of the Gordon firm as litigation counsel if Altman were screened from any participation in the matter (147a).

Following the Gordon firm's engagement, the litigation files, including those received from the SEC, were turned over by Barrett Smith and the lengthy task of transferring accumulated knowledge about the case was begun.[8]

It is uncontradicted, and the courts below found, that throughout the course of work conducted by the Gordon firm, Altman has been screened from any contact with the matter. Attorneys, paralegals, and secretaries who work on the Capital Growth matter in the firm have been under instructions not to discuss the matter in his presence. Altman has not had access to any document or file in the case. At no time has Altman imparted any information which he may have had regarding the merits of the matter to anyone in the firm. Nor has Altman received any financial benefit by virtue of the firm's conduct of the matter (122a, 151a; A. 68, 72; A. 22-23, 28).

8. The present action was commenced thereafter, in September, 1976.

Decisions Below

In denying petitioners' motion to disqualify, the District Court concluded that the Gordon firm had properly followed the dictates of ABA Opinion 342 and the subsequent opinion of the Association of the Bar of the City of New York to the same effect, and that there was no appearance of impropriety in the Gordon firm's continued representation of the Receiver (A. 73). The court further found that appellants had suffered no prejudice. On the contrary, in opposition to the motion, the Receiver showed that, because of the small size of the estate, the additional costs of employing new counsel might require that the matter be discontinued (123a).

A panel of the Second Circuit Court of Appeals adopted the District Court's fact finding that there had been no impropriety or taint, but reversed in order to set out a "prophylactic measure" to prevent an "appearance of impropriety" (A. 62-63). The Court of Appeals, in its comprehensive *en banc* opinion by Circuit Judge (now Chief Judge) Feinberg, vacated the opinion of the panel and affirmed the District Court's order.[9] The opinion adopted the fact findings of the District Court and stressed that there was "no threat of taint" to the integrity of the trial process (A. 30), and it noted that the "disqualification of the Gordon firm will have serious consequences for this litigation; separating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart, his attempt to obtain redress for defendants' alleged frauds." (A. 29). In particular, the Court of

9. The *en banc* opinion of the Second Circuit in this case is now officially reported at 625 F.2d 433.

Appeals referred to the facts, found by the District Court, that

> "the receiver will not be making unfair use of information obtained by Altman as a government official, since the SEC files were turned over to the receiver long before he retained the Gordon firm and Altman has been entirely screened from all participation in the case, to the satisfaction of the district court and the SEC."

(A. 28; footnote omitted). The Second Circuit, in concluding that "the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . .' " (A. 29), quoting *Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241, 1247 (2d Cir. 1979), was thus careful expressly to limit its holding on the appropriateness of screening to

> "a case such as this, where no threat of taint exists and where appellants' motion to disqualify opposing counsel has successfully crippled the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public."

(A. 30).[10]

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10. The *en banc* opinion of the Second Circuit was concurred in by all the participating judges, with the exceptions of Judges Meskill and Mulligan, who concurred on the merits but dissented as to appealability, Judge Van Graafeiland, who concurred regarding appealability but took no position on the merits, and Judge Newman (the author of the panel opinion), who concurred regarding appealability but dissented regarding the merits.

Reasons for Denying the Writ

I

The Question of Appealability under 28 U.S.C. § 1291 Is Effectively Moot.

The Second Circuit, in its *en banc* opinion in this case, held that orders denying disqualification motions are not immediately appealable as final orders under the rule of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Nevertheless, the Second Circuit proceeded to review this case on the merits of the denial of the disqualification motion because (i) "a refusal to do so will leave the law of the circuit on attorney disqualifications in a muddled state" because of the existence of the panel's opinion (A. 20); (ii) the district courts would be provided with no guidance on the standards to apply in disqualification situations, an impact which would have been most immediately felt upon the remand of the present case, and (iii) there would have been "an enormous waste of judicial resources" in this case (*id.*), particularly since the issue would ultimately have to come back for review if the petitioners or other defendants in this case are unsuccessful at trial. The rule regarding appealability from the denial of disqualification motions was thus held to be prospective only.[11] The Court of Appeals went on, for sixteen of the twenty-four pages of the slip opinion, to review the merits of the disqualifica-

11. Indeed, in a later opinion in an unrelated case, the Second Circuit applied this same rationale to review, and reverse, the denial of a motion for disqualification where the appeal had been filed, briefed, argued, and considered prior to the filing of the *en banc* opinion in the present case. *Cheng* v. *GAF Corp.*, Dkt. No. 80-7254 (2d Cir., August 26, 1980).

tion claim. Accordingly, this case has already been appealed, reviewed and determined on the merits.

This Court has repeatedly held that, because of the limitations imposed by Article III of the Constitution, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971); *Oil Workers Union* v. *Missouri,* 361 U.S. 363, 367 (1960). *See DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974). On the appealability issue raised in this case, there has ceased to be a "definite and concrete" controversy which "touch[es] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937). Whether the holding of the Second Circuit on the issue of appealability is affirmed or reversed, the petitioners have already received Second Circuit review of the disqualification issue. If this Court concurs with the decision rejecting appealability, there would be no need to reach the question of the standards for disqualification. Similarly, if this Court were to accept review on the appealability question and reverse, holding that orders denying motions to disqualify are appealable, there would be no need to remand the case to the Second Circuit since this case has already been considered and determined on appeal.

In addition, as petitioners have pointed out, this Court has already agreed to review the issue of appealability sought to be presented in this case by granting the petition for a writ of certiorari in *Firestone Tire & Rubber Co.* v. *Risjord,* —— U.S. ——, 48 U.S.L.W. 3733 (U.S. May 12, 1980) (No. 79-1420). By reason of the grant of the petition

in *Firestone*, this Court has assured that the public interest in having this procedural issue resolved, *cf., United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309-10 (1897), as well as the paramount interest in the uniformity of interpretation under 28 U.S.C. § 1291 will be served and a uniform rule, establishing the proper procedure in all of the federal courts, will be promulgated. On the other hand, a determination to hold this petition pending a decision in *Firestone* could only serve to exacerbate the delay and disruption which, for fully two years, "has successfully crippled the efforts of a receiver . . . to obtain redress for alleged serious frauds on the investing public." (A. 30).

Therefore, the present petition for a writ of certiorari raises no question on the appealability issue necessary or appropriate for review by this Court. Indeed, the issue of appealability of an order denying a motion to disqualify is, in a practical sense, moot insofar as the present case is concerned.

II

The Decision of the Court of Appeals on Disqualification Creates No Conflict with Any Decision of this Court or of Any Other Circuit and Decided No Significant Unsettled Question of Federal Law.

In its decision affirming the District Court's denial of the motion to disqualify the Receiver's counsel, the Second Circuit applied a flexible rule designed to take account of the particular facts of each case. Under that rule, the disqualification of attorneys is called for only when the challenged conduct has affected or will affect the outcome

of the proceeding in which the attorneys are involved. *Board of Education* v. *Nyquist, supra; Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 236 (2d Cir. 1977). In reaching the conclusion not to disqualify the Receiver's counsel, the Second Circuit relied on the detailed factual findings made by the District Court, and in particular, those findings that "no threat of taint exists" (A. 30), and that there was no "appearance of impropriety" sufficient to warrant disqualification (*id.*). By so structuring its opinion as to rely heavily upon the detailed findings of fact of the District Court, the Second Circuit has made it clear that it was not decreeing an absolute disqualification rule which would automatically apply any time lawyers affiliated with a former government attorney appeared in a case. The Second Circuit fully recognized that there might exist situations where disqualification would in fact be appropriate. *See* A. 30. However, it held that, based upon the District Court's finding that "the Gordon firm's representation of the receiver posed no threat to the integrity of the trial process" and that "disqualification of the Gordon firm will have serious consequences for this litigation" (A. 29), the total screening of Altman was held to be appropriate and need not be accompanied by disqualification of his entire firm.

The decision by the Second Circuit in this case is fully consistent with prior case authority in this area. Indeed, those cases which have considered the application of "screening" procedures to isolate effectively former government attorneys from the conduct of litigations related to matters they might have handled or supervised while in the Government have fully endorsed the practice. *See Central Milk Producers Cooperative* v. *Sentry Food Stores,*

Inc., 573 F.2d 988 (8th Cir. 1978); *Kesselhaut* v. *United States*, 555 F.2d 791 (Ct. Cl. 1977); *United States* v. *McDonnell Douglas Corp.*, Crim. No. 79-516 (D.D.C. June 4, 1980). Other decisions tend merely to substantiate the observation that such cases vary significantly on their facts from case to case. Thus, for example, the cases cited by petitioners principally involved actual participation in private litigation by former government attorneys. *E.g.*, *Telos, Inc.* v. *Hawaiian Telephone Co.*, 397 F. Supp. 1314 (D. Hawaii 1975).[12] Similarly, the situation in this case, where the Receiver's counsel conducted itself in conformity with the letter and spirit of ABA Opinion 342, as the District Court found, is to be distinguished from situations where no such effort was made. *E.g.*, *United States* v. *Kitchin*, 592 F.2d 900 (5th Cir.), *cert. denied*, 444 U.S. 843 (1979).

Petitioners can point to no federal statute which has been violated, or to any provision of the Constitution which is even arguably implicated by the opinion of the Court of Appeals in this case. Generally, "the regulation of the activities of the bar is at the core of *the State's* power to protect the public," *Bates* v. *State Bar of Arizona*, 433

12. These cases involving former government attorneys are, of course, to be distinguished from situations where actual conflicts of interest with respect to different clients of private attorneys are involved. For example, the claim before this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, involves an asserted conflict of interest arising from an attorney's simultaneous representation of two clients with adverse interests. Such a situation accounts for the bulk of the citations made by petitioners. *E.g.*, *Cheng* v. *GAF Corp.*, *supra*; *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, *supra*; *Cinema 5 Ltd.* v. *Cinerama Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Lasky Bros. of W. Va.* v. *Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). The wholly distinct situation of the former government attorney—the situation presented by this case—is the subject of a federal statute. *See infra* at 17-18 & n. 13.

U.S. 350, 361 (1977) (emphasis added). Accordingly, the prior occasions when this Court has undertaken a review of the ethical conduct of attorneys have generally involved conflicts between claims of appropriate ethical standards of conduct and explicit constitutional or statutory protections. *E.g., Bates* v. *State Bar of Arizona, supra* (Sherman Act); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975) (first amendment and Sherman Act); *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U.S. 154, 157 (1971) (first amendment); *Sperry* v. *Florida ex rel. Florida Bar,* 373 U.S. 379 (1963) (35 U.S.C. § 31 regulating practice before the U.S. Patent Office); *Cohen* v. *Hurley,* 366 U.S. 117, 123-124 (1961) (fifth and fourteenth amendments).

Nor could petitioners show any conflict with any federal statute, since the one statute generally covering the ethical conduct of former government attorneys does not in any way proscribe the activities of partners or associates of the former government attorney. 18 U.S.C. § 207.[13] The

13. In the form enacted in 1962, section 207 provided, in relevant part, "A partner of a present *or former* officer or employee of [the Government] shall as such be subject to the provisions of sections 203, 205, and 207 of this title *only* as expressly provided in subsection (c) of this section." 18 U.S.C. § 207 (1964) (emphasis added). Subsection (c) of former section 207 by its terms only regulated the conduct of partners of current government officers and employees (as does the equivalent subsection in the 1978 revision, § 207(g)). In a contemporaneous memorandum regarding the 1962 enactment of section 207, the Attorney General emphasized the intent to limit the prohibitions of section 207 to partners of current government employees:

> "Subsection (c) of section 207 pertains to an individual outside the Government who is in a business or professional partnership with someone serving in the executive branch, an independent agency or the District of Columbia. The subsection prevents such individual from acting as attorney or agent for anyone other than the United States in any matters, including those in court, in which his partner in the Government is participating or has participated or which are the subject of his partner's official responsibility. *Although included in a section dealing largely with post-*

(footnote continued on next page)

existence of this statute and, more fundamentally, the thorough consideration given to this entire area by Congress in its 1978 revisions to section 207 serve both to distinguish this case from the situation presented in *Firestone* and to minimize the need for this Court to undertake an independent review of this issue.

Although section 207 specifically prohibits certain activities by partners of *current* government employees, 18 U.S.C. § 207(g), Congress did not attempt to regulate in any parallel way the conduct of partners of *former* government employees. Since the provisions regarding both present and former government employees appear in the same section of the statute, it is clear that this is an appropriate occasion for this Court to employ its "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974).

In addition, the approach used by the Second Circuit, referring specifically to the facts of each case to determine

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employment activities, this provision is not directed to the post-employment situation."

Memorandum of Attorney General, 28 Fed. Reg. 985 (1963), 18 U.S.C. § 201 note at p. 1030 (1976) (emphasis added).

Although the 1978 revisions to section 207 have been extensive, the substance of the restrictions have *not* been expanded to include any prohibition of activity by partners of *former* government officers or employees. This fact has been emphasized by the fact that the sentence quoted at the outset of this footnote has been replaced by a change in the title of the section, to "Disqualification of former officers and employees; disqualification of partners of *current* officers and employees." 18 U.S.C. § 207 (emphasis added).

For the convenience of this Court, the current and former versions of section 207 are set forth in the Appendix to this brief.

whether or not disqualification is appropriate, seems fully consistent with the intent of Congress in structuring the proscriptions of 18 U.S.C. § 207. In particular, the report of the Senate Committee on Governmental Affairs accompanying the Senate bill which ultimately was enacted as the 1978 revisions to section 207, specifically addressed the concern, also raised by the Second Circuit (A. 23-24), that a too stringent rule would affect the ability of the Government to function effectively.

> "18 USC 207, like other conflict of interest statutes, seeks to avoid even the appearance of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.
>
> "But, as with other desirable policies, it can be pressed too far. *Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. Both are important and a conflicts policy cannot focus on one to the detriment of the other.* There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office."

S. Rep. No. 95-170 at 32 (March 16, 1977), reprinted in 1978 *U.S. Code Cong. and Admin. News* 4217, 4248 (1978) (emphasis supplied). This is precisely the concern which led the Second Circuit to reject the *per se* rule adopted initially by the panel decision in this case.

Thus, the decision of the Second Circuit is fully consistent not only with the governing statute regarding conduct of former government attorneys, but also with the underlying expression of concern by the Congress, reported in the legislative history of the most recent revisions to section 207.

Finally, the consensus of critical and professional commentary on utilization of the screening procedures endorses the application of such procedures in situations like that presented here. Thus, the procedures advocated by the American Bar Assocation in ABA Opinion 342 have been subsequently endorsed both by the Association of the Bar of the City of New York,[14] by the New York State Bar Association,[15] by the Administrative Conference of the United States,[16] and by the District of Columbia Court of Appeals.[17] In addition, although the petitioners note that a discussion draft proposal of a study commission of the American Bar Association has proposed a *per se* disqualification rule, *see* Petition at 16-17, that very draft proposal has been severely criticized and is understood to

14. *See* Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, Opinion No. 889, *supra*, 31 *The Record* 552.

15. New York State Bar Association Opinion No. 502 (1978), *New York Law Journal*, Jan. 18, 1979, p. 3, col. 3.

16. *See* ACUS Recommendation 79-7, 45 Fed. Reg. 2309 (Jan. 11, 1980).

17. *See* Notice of Proposed Order, adopting, with certain revisions, *inter alia*, Disciplinary Rule 9-102 of the Code of Professional Responsibility (April 17, 1980) (reported in *Legal Times of Washington*, April 28, 1980, page 24). Due to the controversy evoked by certain aspects of this proposal, the District of Columbia Court of Appeals has suspended the effective date of the proposal in order to elicit further comment from the Bar.

be undergoing substantial revision at this time.[18] *See also* Kaufman, *The Former Government Lawyer and the Canons of Professional Ethics,* 70 Harv. L. Rev. 657 (1957).

The opinion of the Second Circuit in the present case has appropriately limited the effect of its ruling to the peculiar facts presented here, fully anticipating that different situations may arise which would require disqualification of the partners and associates of a former government attorney. This result implicates no constitutional interest, violates no statute or rule of the federal courts, is fully consistent with the case authorities which have addressed the issue, and is consistent with both the expressions of Congress on this subject and the consensus of scholarly and professional opinion. No significant unsettled question of federal law is thus presented by this aspect of the petition.

Accordingly, the disqualification issue sought to be presented by petitioners is, as recognized by the Second Circuit, more appropriate for case-by-case development of the law and the considered promulgation of prescriptive rules of ethical conduct by the Bar and the states. Given the consistency of the result below with the treatment of this issue by Congress and the federal courts which have addressed it, respondents respectfully submit that a writ of certiorari should be denied, and the two-year hiatus in the conduct of this case, which "has successfully crippled the efforts of a receiver" and the important public interests he represents (A. 30), should be ended.

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18. *See, e.g.,* Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, Preliminary Report on the ABA Proposed Model Rules of Professional Conduct (Jan. 30, 1980 draft), at 24-26 (July 1980). The Attorney General of the United States has also criticized the "imputed disqualification" provision of the ABA draft proposal. *Legal Times of Washington,* June 9, 1980, p. 23.

Conclusion

The petition for the writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied in all respects.

Dated: October 17, 1980

Respectfully submitted,

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APPENDIX

APPENDIX

18 U.S.C. § 207, as amended

Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year,

having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d) (1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O–9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O–7 or O–8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethies in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) an elected official of a State or local government, or

(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Govern-

ment Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from

making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.

18 U.S.C. § 207, as enacted by Pub. L. 87-849, § 1(a), 76 Stat. 1123 (Oct. 23, 1962)

Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

(b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested, and which was under his official responsibility as an officer

or employee of the Government at any time within a period of one year prior to the termination of such responsibility—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both: *Provided,* That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility—

Shall be fined not more than $5,000, or imprisoned not more than one year, or both.

A partner of a present or former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia or of a present or former special Government employee shall as such be subject to the provisions of sections 203, 205, and 207 of this title only as expressly provided in subsection (c) of this section.